

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
VONAGE HOLDINGS CORPORATION)	WC DOCKET NO. 03-211
)	
Petition for Declaratory Ruling)	
Concerning an Order of the Minnesota)	
Public Utilities Commission)	

Comments of the Montana Telecommunications Association

I. Introduction

Vonage petitions this Commission to preempt an Order of the Minnesota Public Utilities Commission “because Vonage is a provider of information services (and not a telecommunications carrier or common carrier subject to Title II of the Communications Act of 1934)...”¹ Vonage further argues that “in the alternative, the Commission can grant this Complaint without determining whether Vonage’s service constitutes an information service, because the nature of the Internet makes it inherently impossible to separate this service (regardless of its regulatory classification) into distinct interstate and intrastate components.”²

MTA respectfully disagrees with both of Vonage’s assertions, and further argues that sound public policy considerations must conclude that the negative consequences of granting Vonage’s request outweigh the purported benefits of exempting Vonage from its public obligations as a telecommunications service provider.

¹ *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*. Petition for Declaratory Ruling (*PETITION*). WC Docket No. 03-211. September 22, 2003. p.1.

² *Ibid.* p.1.

II. Vonage Meets both Federal and State Definitions of Telecommunications Service

Under Minnesota statute,

“Telephone company” means and applies to any person, firm, association or any corporation, private or municipal, owning or operating any telephone line or telephone exchange for hire, wholly or partly within this state, or furnishing any telephone service to the public.³ (Emphasis added.)

The Minnesota Public Utilities Commission (MPUC) asserts jurisdiction over telephone companies operating in Minnesota.

“No person shall provide telephone service in Minnesota without first obtaining a...certificate of authority from the commission under terms and conditions the commission finds to be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with commission rules, and the commission’s rules.”⁴

The MPUC notes that “telephone service” is not defined in statute. However, its September 11, 2003 Order points out that the Minnesota Supreme Court has ruled that “whether appellant is supplying ‘telephone service’ is a question of law to be determined on the basis of the operative facts determined by the commission.”⁵

Similarly, Vonage’s DigitalVoice Service meets the Federal definition of telecommunications service, by

³ Minn. Stat. §237.01, subd.7.

⁴ Minn. Stat. §237.16 subd.1(b).

⁵ *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota* Docket No. P-6214/C-03-108. ORDER FINDING JURISDICTION AND COMPLIANCE. (Hereinafter, *ORDER*.) September 11, 2003. p.1. The ORDER cites *Minnesota Microwave, Inc. v. Public Service Commission*, 291 Minn. 241, 190 N.W.2d 661 (1971). The Court considered for the first time whether a private company providing unidirectional, closed-circuit, microwave facilities was subject to the jurisdiction of the Commission as a “telephone company” or a supplier of “telephone service.”

offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used."⁶ (Emphasis added.)

Moreover, contrary to Vonage's assertions, Vonage's DigitalVoice Service is not an "information service." "Information service" is defined as

The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.⁷ (Emphasis added.)

Vonage contends that because of the facilities it uses (i.e., broadband Internet connections) its voice telephony service avoids being defined as a telecommunications service. Yet, it clearly offers a telecommunications service for a fee directly to the public. Whether it offers its service using the Internet, or tin cans and string, is irrelevant, since Congress specified the service, and not the facilities as the relevant factor.

Vonage also cites FCC "precedent" in an attempt to defend its assertion that it is not a telecommunications service provider. For example, Vonage contends that its DigitalVoice service "performs a net protocol conversion, and therefore is an information service under Commission precedents."⁸ The conversion that Vonage describes in its Petition, however, results in no apparent change in the appearance or performance of the telephone service from the end user's perspective. Vonage would like us to believe there's a net protocol conversion because the Commission has stated that protocol processing services that result in no net protocol conversion to the end user are deemed telecommunications services.⁹

⁶ 47 U.S.C. § 153(46).

⁷ 47 U.S.C. § 153(20).

⁸ PETITION at p.2.

⁹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 98-67 (April 10, 1998) at ¶ 50.

The protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification, under the Commission's current approach, because it results in no protocol conversion to the end user.¹⁰ (Emphasis added.)

From an end-user perspective, the conversions that take place in a voice over IP call are no greater or lesser than conversions that take place when an analog voice signal is converted to a digital signal and transmitted over a fiber optic network, or converted again into an analog or digital radio signal and transmitted over a wireless network. The Commission's "current approach" does not preclude classification of Vonage's service as a telecommunications service because of any conversions that may take place that are transparent to the end user. The service being delivered is pure "telecommunications" as defined by Statute. Vonage's service constitutes

the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.¹¹

This Commission further has determined that a functional approach to the definition of telecommunications service is appropriate.

This functional approach is consistent with Congress' direction that the classification of a provider should not depend upon the type of facilities used...Its classification depends rather on the nature of the service being offered to customers...¹²

Vonage's telephony service meets additional Commission criteria for classification as a telecommunications service. IP telephony may be considered a telecommunications service if: 1) it holds itself out as providing voice telephony or facsimile transmission service; 2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or

¹⁰ Ibid., at ¶ 52.

¹¹ 47 U.S.C. § 153(48).

¹² Op cit. at ¶ 59.

facsimile transmission) over the public switched telephone network; 3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan; and associated international agreements; and 4) it transmits customer information without net change in form or content.¹³

Vonage holds itself out as providing voice telephony. Vonage's web site calls Vonage "The Broadband Phone Company."TM Indeed, Vonage holds itself out as a substitute to existing telecommunications providers; its web site urges customers to "change your phone company."¹⁴

Vonage's CPE permits ordinary touch-tone calls over the public switched phone network (PSTN). Vonage customers "use a specialized computer called a Multimedia Terminal Adapter ("MTA"), which contains a digital signal processing unit that performs digital-to-audio and audio-to-digital conversions and has a standard telephone jack connection." Moreover, "a customer can connect conventional analog telephone sets to the MTA computer for use with Vonage's service...Vonage is also testing compatibility of its service with...WiFi-enabled phones. In short, Vonage's network processes IP packets, regardless of what devices are used to encode or decode the audio content contained in those packets."¹⁵ (Emphasis added.) CPE may even include optional cordless phones.¹⁶

Vonage allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan (NANP). Vonage urges customers on its web site to keep their phone numbers if they choose Vonage's "phone service." Moreover, "Vonage users can initiate and receive communications to and from PSTN users"¹⁷ and according to the MPUC, "allows its end users to call telephone numbers assigned in accordance with NANP."¹⁸

In short, Vonage's "phone service" is just that: phone service.

¹³ Ibid. at ¶ 88.

¹⁴ See www.vonage.com. "there's a good chance we can help you keep your existing phone number if you choose Vonage phone service."

¹⁵ PETITION at p.5.

¹⁶ Ibid. p.6.

¹⁷ Ibid. p.6. Also, "Because Vonage customers may receive calls from users on the PSTN, Vonage associates each of its customers with one or more telephone numbers." at p.7.

¹⁸ ORDER (op cit.). p.5.

Moreover, as the MPUC points out, nowhere does Vonage publicly hold itself out as an “information service.”¹⁹

Vonage spends considerable effort in claiming that its service is an information service, and as such Congress intends to “preserve the vibrant and competitive free market...for the Internet and other interactive computer services, unfettered by Federal or State Regulation.”²⁰ Vonage is neither an Internet Service Provider nor an Internet access provider. While Congress may have intended to confer a special deregulatory distinction the Internet, Vonage’s DigitalVoice service is, for all intents and purposes, a telecommunications service using Internet facilities. Vonage is offering telecommunications for a fee directly to the public, *regardless of the facilities used*.

For the reasons discussed above, Vonage’s DigitalVoice service should be considered a telecommunications service and held to the same obligations conferred upon other telecommunications services under both State and Federal law.

The MPUC reasonably concluded that

Vonage offers unlimited local and long distance calling as well as Caller ID, Call Waiting, and Voicemail. Vonage itself holds itself out as providing all-inclusive home phone service and advertises that it replaces a customer’s current phone company...[T]he customer uses an ordinary touch-tone phone to make calls and carry on conversations...[T]he customer is being provided with service that is functionally the same as any other telephone service. Further, the Vonage service intersects with the public switched telephone network. The Commission finds that what Vonage is offering is two-way communication that is functionally no different than any other telephone service...and is clearly subject to regulation by the Commission...[There is no] federal law which preempts state law with respect to telephone services provided using VOIP technology. Further, the Minnesota Legislature has not exempted services provided by VOIP technology from regulation.”²¹

¹⁹ Ibid. p.5. “Vonage markets its Digital Voice service on its website as a telecommunications service and nowhere mentions its service as an informational service. Further, the [Minnesota Department of Commerce] noted that the FCC, in its Report to Congress [*In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13FCC Rcd 11501 (1998).], discounted the argument that voice communications using IP telephony, of the type used by Vonage, fell under the definition of information services.”

²⁰ PETITION at p.19, citing 47 U.S.C. § 230(b)(2).

III. Balance of Harms

Vonage claims that its 911 service offering currently does not meet Minnesota's standards.²² (Vonage attests that it is "continuing...efforts to improve its 911 dialing service.")²³ Additionally, Vonage asserts that "preemption is appropriate here because of the impossibility of separating the Internet, or any service offered over it, into intrastate and interstate components."²⁴

Vonage thereby alleges that classification of its DigitalVoice service as a telecommunications service may result in state or federal obligations with which it would be impossible for Vonage to comply. The implication is that such a classification may harm Vonage by preventing it from doing business in Minnesota.

A more realistic assumption may be that such a classification might force Vonage to meet the same obligations that any other telecommunications service provider satisfies while doing business in Minnesota. The Commission did not tell Vonage it could not operate in Minnesota. It only said that if it does business in Minnesota, it has to do it under Minnesota law governing telephone service.

The Commission has never indicated it would refuse to grant a certificate to Vonage. And while staff cannot speak for the 911 authorities, it is staff's recollection that both they and Vonage expressed an interest in working together to resolve problems. It is not clear to staff that Vonage would suffer irreparable harm from complying with the Order.²⁵

²¹ ORDER. p.6.

²² PETITION. p.24. "Vonage requests that the Commission declare that specific, discrete aspects of Minnesota's 911 requirements are in conflict with national policies because they would inseparably affect Vonage's interstate operations, and effectively require Vonage to operate as a telecommunications carrier."

²³ PETITION. p.9.

²⁴ PETITION. p.27.

²⁵ *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holdings Corp Regarding Lack of Authority to Operate in Minnesota*. Minnesota Public Utilities Commission. Docket P6214/C-03-108. Staff Briefing Paper by Stuart Mitchell, "What action shall the Commission take on Vonage's Motion to Stay?" October 9, 2003. p. 5. "[T]he Commission would like to see Vonage offering service in this state, but must insist that the Company follow state laws and rules in doing so."

If a telecommunications service provider, whether Vonage or any other company, has difficulty complying with its public obligations, the company is free to petition for waivers, modifications, or forbearance from rules with which it must comply, and regulators are free to grant or deny such petitions.

Moreover, it is important to note here that the MPUC “has granted certificates of authority to other VOIP providers.”²⁶ (MTA emphasis.)

In short, Vonage argues that the Commission should preempt the MPUC based on Vonage’s assertion that its DigitalVoice service is an information service. But Vonage sheds little light on any potential harm that might result if its service were classified as a telecommunications service. Any harm implied by Vonage is speculative at best.

On the other hand, the Commission needs to consider not only any perceived harms that Vonage may, or may not, incur from the MPUC’s order. It also needs to weigh harms to existing carriers and to the public that may result from granting Vonage’s petition.

In this regard, this Commission and the MPUC have an obligation to protect public safety and welfare. For example, state and national public policy place a high priority on implementation and deployment of “911” capabilities. Telecommunications service providers and public safety entities are expending substantial resources to ensure an effective, nationwide 911 system for meeting public safety demands. If consumers are using Vonage’s service as a substitute for phone service from another provider, it is incumbent on Vonage to ensure that those consumers have access to 911 emergency services on a par with the service consumers receive currently. However, if Vonage is allowed to escape 911 compliance obligations, consumers may be found erroneously depending on a service that doesn’t work, with potentially disastrous consequences.

Other harms are found in the public interest authority vested in regulatory entities to effect a minimum level of consumer protection. “The record in this matter is that Minnesota rules provide greater protection for consumers in

matters such as disconnection of service and billing disputes than do Vonage's policies."²⁷ As noted above, the Minnesota Commission's statutory authority includes ensuring "fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with commission rules."²⁸

Further, "worthy of consideration by the Commission is the harm to companies lawfully offering telephone service in Minnesota due to the unfair advantage Vonage enjoys through its offering of telephone service without complying with the requirements of the law."²⁹

In other words, any perceived harm to Vonage from being classified as a telecommunications service provider is outweighed by the threats to public interests if Vonage's service were classified as an information service and its service were exempted from the obligations that competing service providers must comply with.

IV. Intrastate v. Interstate

Vonage requests that if the Commission does not preempt the MPUC on the basis of Vonage's claim that its DigitalVoice service is an information service, then "the Commission should declare that Minnesota's regulation of Vonage's service is preempted because it is inherently impossible to separate any service offered over the public Internet (regardless of its regulatory classification) into distinct interstate and intrastate components."³⁰

MTA acknowledges Vonage's contention with regard to the difficulty of associating physical location with IP addresses. However, Vonage establishes nexus with its customers in the areas in which it operates by obtaining local

²⁶ ORDER. p.6, fn 10: *In the Matter of a Request by SurfTel, Inc. for Approval for a Certificate of Authority to Provide Facilities Based Interexchange Services*, Docket No. P-5782/NA-99-588, Commission Order Approving Application, June 29, 1999.

²⁷ Staff Briefing Paper. p.4.

²⁸ Op cit. fn.4.

²⁹ Ibid. p.4.

³⁰ PETITION, p. 31.

telephone numbers in accordance with NANPA. Additionally, Vonage locates its customers through their billing address.

Further, MTA does not find compelling Vonage's argument that if Vonage can't comply with telecommunications service obligations then it shouldn't have to. Again, Vonage offers a service to the public which it holds out as a substitute to service provided by a phone company. However, it can't provide adequate 911 protection to its customers. And it can't definitively determine how much of its service is local or long distance. Therefore, according to Vonage, we should just look the other way whenever a policy comes along that it doesn't like.

Vonage points out in its Petition that some similarity exists between Vonage's VOIP service and mobile wireless service, in terms of determining physical location of customers.

On mobile wireless networks, determining jurisdiction is somewhat more difficult, but since the wireless carrier can track which cell site antenna is serving the customer's mobile unit, it can generally determine at least a reasonable approximation of the customer's location.³¹ (Emphasis added.)

MTA believes that with Vonage's cooperation, the Commission can generally determine at least a reasonable approximation of the interstate v. intrastate jurisdiction of voice over IP traffic, either by developing a safe harbor mechanism like the one used in the CMRS environment, and/or by using billing address information.

V. Public Interest

Competitive neutrality. Cost of regulatory compliance is one set of factors that must be weighed in determining harm. If Vonage is offering a substitute for phone service, but can avoid the public responsibilities and associated costs faced by its competitors, it would enjoy a significant competitive advantage vis a vis similarly situated companies lawfully offering telephone service. If one

³¹ PETITION, p. 28.

telecommunications service provider incurs such costs and a similar service provider does not, a competitive advantage is conferred upon the latter, not as a result of economic factors, but as a result of regulatory fiat. Winners and losers will be created not in the marketplace, but in the regulatory arena.

Intercarrier compensation. Another consequence that must be considered is the effect of Vonage's petition on the viability of the public switched telephone network. Vonage admittedly offers local and long distance calling to its customers. Moreover, Vonage customers can place calls to customers using the PSTN, and vice versa. Regardless of how much Vonage traffic is carried on PSTN facilities, the services offered by Vonage are to the end-user virtually identical to the services offered by "traditional" carriers. Yet, there is little evidence that Vonage compensates telecommunications carriers through either reciprocal compensation or access arrangements for costs associated with completing local and long distance calls for Vonage.³² In other words, Vonage is getting a "free ride," at the expense of end-users remaining on the "traditional" network. Investment recovery becomes more difficult for PSTN, leading to higher prices for end users of the PSTN and/or less investment.

Because intercarrier compensation mechanisms such as reciprocal compensation, access and universal service have become so inextricably intertwined, if Vonage offers a substitute service without participating equitably in the intercarrier compensation regime that supports the public network, then the public network will be threatened with gradual atrophy.³³ As more consumers migrate to telephony services that are "unfettered" by such intercarrier compensation obligations, remaining customers—likely higher cost, harder to

³² Vonage contends it "purchases local telephone services...to enable access to its network from the PSTN" (PETITION, at 7.) As Vonage describes on its web site, a New York customer can obtain a Florida number so his mom in Florida can make a "local call." Vonage's local service "purchase" in this case likely refers to arrangements with CLECs for access to local numbers and circuits for purposes of avoiding access charges in a "virtual NXX" scheme.

³³ See *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*. WC Docket No. 02-361. Joint Comments of the Washington Independent Telephone Association, Washington Exchange Carriers Association, Oregon Telecommunications Association, Oregon Exchange Carriers Association, Colorado Telecommunications Association, and the Montana Telecommunications Association. December

serve, rural consumers—will be left with the responsibility—and cost—of preserving and advancing universal service.

Some may argue that’s the way the cookie crumbles. Suppose, *arguendo*, that all telephony eventually may migrate to an IP environment. Even so, such eventual migration still does not obviate the Federal statutory mandate to provide access by all Americans, no matter where they may live, to affordable telecommunications with reasonably comparable services and at reasonably comparable rates.³⁴ There likely will be high cost, remote customers “stranded” by technology migration. It is precisely these consumers for whom universal service is intended. Without equitable and uniform compliance with intercarrier compensation rules by all telephony providers, end users of the “legacy” public network will be faced with supporting an increasingly expensive network.

Additionally, by either preempting state public service authority over IP telephony and/or ruling that voice over IP is an “information service,” the Commission effectively would sanction a separate IP telephony network “unfettered” by financial, regulatory or other public obligations. If IP telephony were classified as an information service, the telecommunications market would be bifurcated into two separate telephone networks, the PSTN and the “PITN” (Public Internet Telephone Network), with the latter out of reach of state or federal public safety interests, or other public policies established by entities created under law to protect the public interest. While Vonage may claim that such an outcome is in its interest, it not at all clear that such an outcome is in the public interest.

Preservation and advancement of universal service remain key tenets of the Telecommunications Act. If Vonage or other VOIP providers are allowed to grow their “unfettered” services, then the Act’s provisions regarding sustainability and predictability are threatened.

Regulatory certainty/investment stability. Not only is universal service, and those it is intended to protect, threatened by lack of predictability and

16, 2002. The Associations illustrate a substantial decline in access minutes of use and related access revenues attributable to IP telephony calls that bypass access charges.

stability, but so too are companies who develop business plans with an expectation of some regulatory certainty on which they base their plans. Introducing a “wild card” competitor into the market, with no regulatory or financial parity, makes business planning and investment riskier than ever—in a market that already is subject to substantial risk.

State authority. It is the responsibility of this Commission, and state commissions collectively to defend the public interest in this regard. Several State Commissions, in addition to the Minnesota PUC, have recognized that providers of telephony services to the public need to meet public obligations as defined and enforced by public institutions such as public service commissions.³⁵

To do otherwise would abdicate their responsibility and would create a vacuum into which some telephone service providers would freely operate with impunity while others would fall under the jurisdiction of their respective state and federal regulatory authorities.

Vonage holds itself out to the public as a phone company while seeking exemption from the obligations of other phone companies whose service Vonage seeks to replace. Vonage wants its cake and eat it too. Preempting a state commission from exercising its statutory authority is a serious matter. Either of Vonage’s requests (to preempt the Minnesota PUC’s Order either because the Commission would accede to Vonage’s request to classify its service as an information service, or to preempt because Vonage cannot accurately distinguish interstate from intrastate traffic) would enable Vonage to walk away from its public obligations as a telephone company and would deny states an appropriate role in exercising their legitimate public duties.

Functional equivalence. As noted above, the “walks like a duck” argument is dismissed by Vonage as an inappropriate “functional analysis” which can “lead the industry down the slippery slope of State regulation of all forms of two-way

³⁴ 47 U.S.C. § 254.

³⁵ At least 14 states are in various stages of legislative or regulatory proceedings focusing on state jurisdiction over voice over IP: AL, CA, CO, FL, IL, MN, MO, NY, OH, OR, PA, VA, WA, WI. (source: Cole, Raywid & Braverman, LLP at www.crblaw.com.)

communications...”³⁶ It is this very functional analysis that Congress, this Commission and State Commissions need to perform in determining whether a service, not a technology or platform, meets the classification criteria of telecommunications service.

MTA asserts that functionally equivalent services should be subject to functionally equivalent rules. To do otherwise would embark the industry on the slippery slope of regulatory arbitrage and uneconomic competition, with long term consequences for all telecommunications consumers.

Regulatory Parity. Offering a service that does not comply with the law is not a reason for not complying with the law. Vonage shouldn't be given special dispensation from meeting the same obligations that other law abiding providers meet.

VI. Conclusion

The MPUC reasonably determined that Vonage's DigitalVoice service is a telecommunications service subject to the MPUC's jurisdiction under the laws and regulations of Minnesota.

The Commission should deny Vonage's petition to preempt the MPUC Order.

Federal preemption is a blunt instrument which denies state jurisdiction over legitimate public interest oversight of intrastate operations of telecommunications providers. States should be able to protect public interest and safety under their own jurisdictions.

Preemption would enable Vonage to escape its public interest obligations, and would deny Minnesota's consumers the benefits of government oversight of telephony in the interest of public safety and welfare, as provided by Minnesota law. Vonage publicly offers its service as a substitute for phone service. It

³⁶ PETITION at p.2. “even if an Internet application walks like a duck and quacks like a duck, the very fact that it is offered over the Internet gives it scales like a reptile.”

should be able and willing to assume the obligations of being a telecom company.

Public interest considerations of competitive neutrality, regulatory certainty and investment stability must be taken into account.

The Commission should determine that voice over IP services are telecommunications services, subject to intercarrier compensation obligations that any other telecommunications service provider must satisfy. To do otherwise would create a train wreck in which virtually identical networks would face radically different regulatory and financial obligations.

Respectfully submitted,

/s/

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